

1 XAVIER BECERRA
Attorney General of California
2 MARISA Y. KIRSCHENBAUER
Supervising Deputy Attorney General
3 BRYAN KAO
Deputy Attorney General
4 CASSANDRA J. SHRYOCK
Deputy Attorney General
5 State Bar No. 300360
455 Golden Gate Avenue, Suite 11000
6 San Francisco, CA 94102-7004
Telephone: (415) 703-1680
7 Fax: (415) 703-5843
E-mail: Cassandra.Shryock@doj.ca.gov
8 *Attorneys for Defendants*
G. Arnett and M. Lopez
9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 CIVIL DIVISION
13

14 **KEVIN SIMMONS,**

15 Plaintiff,

16 v.

17 **G. ARNETT, et al.,**

18 Defendant.
19
20
21
22
23
24
25
26
27
28

2:16-cv-02858 R-KES

**DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT**

**Submitted Concurrently with
[Proposed] Statement of
Uncontroverted Facts and
Conclusions of Law and [Proposed]
Judgment**

Date: November 18, 2019
Time: 9:00 a.m.
Courtroom: 880, 8th Floor
Judge: The Late Hon. Manuel
Real
Trial Date: 3/3/2020
Action Filed: 4/26/2016

1 **TO PLAINTIFF KEVIN SIMMONS, THROUGH HIS COUNSEL OF**
2 **RECORD:**

3 **PLEASE TAKE NOTICE** that on November 18, 2019 at 9:00 a.m. before
4 the Late Honorable Manuel Real, United States District Judge, Defendants Arnett
5 and Lopez move the Court for summary judgment under Federal Rule of Civil
6 Procedure 56.¹ This motion is made following the conference of counsel pursuant
7 to L.R. 7-3 which took place on June 20, 2019.

8 The grounds for this motion are as follows: (1) Defendant Arnett did not use
9 excessive force in violation of the Eighth Amendment; (2) Defendant Lopez was
10 not deliberately indifferent to a serious risk of physical harm to Plaintiff; and (3)
11 Defendants are entitled to qualified immunity.

12 This motion is based on this Notice of Motion and Motion, the supporting
13 Memorandum of Points and Authorities, the [Proposed] Statement of
14 Uncontroverted Facts and Conclusions of Law, supporting declarations and
15 exhibits, the Court's files in this matter, and any other matter that the Court deems
16 appropriate.

17 Dated: September 20, 2019

Respectfully submitted,

18 XAVIER BECERRA
19 Attorney General of California
20 MARISA Y. KIRSCHENBAUER
21 Supervising Deputy Attorney General
22 BRYAN KAO
23 Deputy Attorney General

24 /s/ Cassandra J. Shryock
25 CASSANDRA J. SHRYOCK
26 Deputy Attorney General
27 *Attorneys for Defendants Arnett and*
28 *Lopez*

LA2016502475/21051604.docx

27 ¹ Defendants sought to have this motion heard on October 21, 2019, but at
28 the request of Plaintiff's counsel, Defendants have agreed to set a later date in
November to accommodate their request to meet with their client to oppose the
motion.

TABLE OF CONTENTS

	Page
Memorandum of Points and Authorities.....	1
Introduction	1
Summary of Undisputed Facts	1
I. Applicable Policies and Procedures.	2
II. Plaintiff’s Altercation with Inmate Murrillo on November 28, 2013.....	2
III. Defendant Lopez Evaluates Plaintiff and Refers Him for Further Medical Care.....	5
Standard of Review.....	6
Argument.....	7
I. Defendant Lopez Is Entitled to Judgment as a Matter of Law Because Her Alleged Inaction Did Not Result in Any Delay in Treatment or Harm to Plaintiff.....	7
II. Defendant Arnett Is Entitled to Judgment as a Matter of Law Because He Did Not Use Force Maliciously and Sadistically But Instead to Restore Order.	9
A. Legal Standard for Excessive-Force Claims.....	9
B. The Undisputed Evidence Demonstrates that Defendant Arnett Did Not Use Force Maliciously and Sadistically, But Instead to Restore Order.....	10
III. Defendants Are Entitled to Qualified Immunity.....	12
A. Legal Standard for Qualified Immunity.	12
B. Defendant Lopez Is Entitled to Qualified Immunity Because It Would Not Have Been Clear to Hear That Referring Plaintiff for Emergency Medical Care Violated the Constitution.....	13
C. Defendant Arnett Is Entitled to Qualified Immunity Because It Was Not Clearly Established that His Alleged Conduct Violated the Law.	14
Conclusion.....	15

TABLE OF AUTHORITIES

	Page
CASES	
<i>Anderson v. Liberty Lobby, Inc.</i> 477 U.S. 242 (1986).....	6
<i>Berg v. Kincheloe</i> 794 F.2d 457 (9th Cir. 1986).....	6
<i>Brown v. Lopez</i> No. 1:10-cv-00124 GSA PC, 2013 WL 6512833, *8-*9 (E.D. Cal. Dec. 12, 2013)	11
<i>Browning v. Vernon</i> 44 F.3d 818 (9th Cir. 1995).....	13
<i>Celotex Corporation v. Catrett</i> 477 U.S. 317 (1986).....	6
<i>Davis v. Scherer</i> 468, U.S. 183, 187 (1984).....	13
<i>Farmer v. Brennan</i> 511 U.S. 825, 834 (1994).....	9
<i>Fleming v. LeFevere</i> 423 F. Supp. 2d 1064 (C.D. Cal. 2006)	7
<i>Hamby v. Hammond</i> 821 F.3d 1085 (9th Cir. 2016).....	13
<i>Harlow v. Fitzgerald</i> 457 U.S. 800 (1982).....	12
<i>Hudson v. McMillian</i> 503 U.S. 1 (1992).....	9
<i>Jeffers v. Gomez</i> 267 F.3d 895 (9th Cir. 2001).....	14
<i>Marquez v. Gutierrez</i> 322 F.3d 689, 693 (9th Cir. 2003).....	14

TABLE OF AUTHORITIES
(continued)

	Page
<i>McGuckin v. Smith</i>	
974 F.2d 1050 (9th Cir. 1992).....	7
<i>Meredith v. Arizona</i>	
523 F.2d 481 (9th Cir. 1975).....	9
<i>Mullinex v. Luna</i>	
577 U.S. __ (2015) (per curiam)	12
<i>Pearson v. Callahan</i>	
555 U.S. 223 (2009).....	12
<i>Petty v. Bradbury</i>	
No. 16-1978 SK (PR), 2017 WL 11049960, at *3-*4 (N. D. Cal. Jan. 31, 2017).....	15
<i>Saucier v. Katz</i>	
533 U.S. 194 (2001).....	12, 13, 14
<i>Scott v. Harris</i>	
550 U.S. 372 (2007).....	6
<i>Triton Energy Corp. v. Square D Co.</i>	
68 F.3d 1216 (9th Cir. 1995).....	6
<i>Whitley v. Albers</i>	
475 U.S. 312 (1986).....	9, 10
CONSTITUTIONAL PROVISIONS	
United States Constitution	
Eighth Amendment	1, 8, 9, 15
COURT RULES	
Federal Rules of Civil Procedure	
Rule 56	6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

California Code of Regulations Title 15 § 3286 (2013).....	2
---	---

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Kevin Simmons, a state prison inmate, is suing two California Department of Corrections and Rehabilitation (CDCR) staff members after an officer intervened to stop a fight Plaintiff was involved in and a nurse evaluated and referred Plaintiff for immediate medical care to treat his lower-extremity injuries sustained during the fight. Plaintiff claims that the officer who intervened violated the Eighth Amendment because the force used (40mm sponge rounds) should have been directed to the other inmate, as Plaintiff was the victim of the fight. But the undisputed evidence demonstrates that Defendant Arnett did not use force maliciously and sadistically; instead, he only used force to restore institutional order. Plaintiff also claims that the nurse who evaluated him violated the Eighth Amendment because she failed to document his injuries and improperly documented how the fight occurred before referring Plaintiff for further medical care. But the undisputed evidence demonstrates that Defendant Lopez immediately referred Plaintiff to receive emergency medical care, and therefore any alleged “inaction” by her did not result in any harm to Plaintiff. Finally, Defendants are entitled to qualified immunity because it would not have been clear to them at the time of the incident that they were violating clearly established law. Accordingly, Defendants are entitled to judgment as a matter of law.

SUMMARY OF UNDISPUTED FACTS

Plaintiff Kevin Simmons is a California state prison inmate, who is, and was at all relevant time, incarcerated at California State Prison, Los Angeles County (“LAC”). (Def.’s Proposed Statement of Undisputed Facts (SUF) ¶ 1.) Defendant Arnett is employed as a correctional officer by the California Department of Corrections and Rehabilitation (CDCR), and was assigned to LAC on November 28, 2013. (SUF ¶ 2.) Defendant Lopez is, and was at all relevant times, also a

1 Licensed Vocational Nurse at LAC. (SUF ¶ 3.) In this action, Plaintiff contends
 2 that Defendant Arnett used excessive force on Plaintiff while Plaintiff was involved
 3 in a physical altercation with another inmate, causing Plaintiff to break his leg.
 4 (SUF ¶ 4.) Plaintiff also contends that Defendant Lopez was deliberately
 5 indifferent to his serious medical needs when she did not accurately complete a
 6 CDCR form, and failing to treat his “gunshot” wounds. (SUF ¶ 5.)

7 **I. APPLICABLE POLICIES AND PROCEDURES.**

8 CDCR’s use-of-force policy provides that officers should use whichever force
 9 option he or she reasonably believes is sufficient to subdue an attacker, overcome
 10 resistance, or effect custody. (SUF ¶ 6.) When using a 40mm to intervene in a
 11 fight between inmates, correctional staff are instructed to shoot at “Zone 1,” which
 12 is anywhere below the inmate’s waist, excluding the groin area. (SUF ¶ 7.) If there
 13 is a fight between inmates, the employees who observe the fight will prepare a
 14 written report (CDCR Form 837) regarding the incident. Cal. Code Regs. Tit. 15, §
 15 3286 (2013); (SUF ¶ 9).

16 If there is a fight between inmates, medical staff will also evaluate the inmates
 17 who were involved. (SUF ¶ 10.) Medical staff will ask each inmate to discuss the
 18 circumstances of any injuries the inmate may have sustained and will document the
 19 inmate’s statements, as well as any observed injuries, on a CDCR Form 7219,
 20 Medical Report of Injury or Unusual Occurrence. (SUF ¶ 10.) The completed
 21 CDCR Form 7219 is then delivered to appropriate correctional staff to include as
 22 part of the written report regarding the incident. (SUF ¶ 11.) The form is not
 23 incorporated into the inmate’s medical records. (SUF ¶ 11.)

24 **II. PLAINTIFF’S ALTERCATION WITH INMATE MURRILLO ON NOVEMBER** 25 **28, 2013.**

26 On the morning of November 28, 2013, Plaintiff was permitted to enter
 27 Facility C, Building 4, at California State Prison, Los Angeles County in order to
 28 perform his duties as a barber. (SUF ¶ 15.) Defendant Arnett, who was stationed

1 in the control booth of the building, was the only officer in the building. (SUF ¶
2 14.) The control booth is an elevated position within the building with views of the
3 dayroom and inmates' cells within the building. (SUF ¶ 12.) The officer stationed
4 in the control booth is provided two force options—a 40mm launcher that shoots
5 sponge rounds, and a mini 14 rifle that shoots live rounds. (SUF ¶ 13.) The control
6 booth officer cannot leave the control booth for any reason unless he is relieved by
7 another officer. (SUF ¶ 13.)

8 When Plaintiff arrived in the building, there were a number of inmates out of
9 their cells. (SUF ¶ 16.) Plaintiff walked up the stairs to the upper tier of the
10 building. (SUF ¶ 16.) While Plaintiff was on the upper tier, Inmate Murrillo
11 walked up to him and, after a brief verbal exchange, abruptly punched Plaintiff in
12 the head. (SUF ¶ 17.) Plaintiff immediately put his hands up and grabbed his head.
13 (SUF ¶ 18.) When Defendant Arnett saw what he perceived as two inmates
14 fighting, he notified Central Control that there were two inmates fighting, activated
15 his personal alarm, and ordered both inmates to get down and stop fighting. (SUF ¶
16 19.) Plaintiff was “very dazed” from the punch and did not hear Arnett activate the
17 building alarm or the order to stop fighting. (SUF ¶ 20.)

18 Because the inmates did not stop fighting and get down on the ground after he
19 ordered them to do so, Defendant Arnett loaded the 40mm launcher with one Direct
20 Exact Impact Sponge Round, aimed at Plaintiff's lower extremities, and discharged
21 one round. (SUF ¶ 21.) Defendant Arnett could not tell whether the round made
22 contact. (SUF ¶ 21) Plaintiff heard a “pow” sound and then his knees buckled.
23 (SUF ¶ 22.) This first shot hit allegedly hit Plaintiff in the left shin. (SUF ¶ 22.)
24 As his knees buckled, Plaintiff reached out for the railing along the upper-tier, but
25 before he could grab the rail, Inmate Murrillo grabbed him and spun Plaintiff
26 around. (SUF ¶ 23.) Plaintiff ended up on his knees, with his back to the railing
27 (and Defendant Arnett), while Inmate Murrillo was directly in front of Plaintiff,
28 facing him. (SUF ¶ 23.) Plaintiff wrapped his arms around Inmate Murrillo's

1 waist, and buried his face in Inmate Murrillo's stomach area. (SUF ¶ 24.) Inmate
2 Murrillo continued to punch Plaintiff in the head, neck, and back area. (SUF ¶ 24.)

3 Defendant Arnett gave a second order to Plaintiff and Inmate Murrillo to stop
4 fighting and get down, but the inmates continued to fight. (SUF ¶ 25.) Plaintiff
5 claims he did not hear Defendant Arnett's order. (SUF ¶ 25.) Because Defendant
6 Arnett perceived that the fight was on-going, he reloaded the 40mm launcher with
7 one Direct Exact Impact Sponge Round, aimed at Plaintiff's lower extremities, and
8 discharged another round. (SUF ¶ 26.) Defendant Arnett could not tell whether the
9 round made contact. (SUF ¶ 27.) This second shot purportedly hit Plaintiff's left
10 thigh. (SUF ¶ 27.)

11 Plaintiff kept his arms wrapped around Murrillo's waist but his hold got
12 steadily lower as Murrillo continued to punch him. (SUF ¶ 28.) When Plaintiff
13 was holding on to Inmate Murrillo's legs "towards his ankles," he felt the third shot
14 hit his right buttocks. (SUF ¶ 28.) When he fired the third shot, Defendant Arnett
15 perceived that the fight between Plaintiff and Inmate Murrillo was still on-going.
16 (SUF ¶ 29.) After the third shot was fired, correctional staff entered the building
17 and both inmates laid down on the ground, and no further shots were fired. (SUF ¶
18 30.) The whole altercation lasted about 30 to 45 seconds. (SUF ¶ 31.)

19 Defendant Arnett fired each shot from about approximately 30-50 feet away.
20 (SUF ¶ 32.) Each time Defendant Arnett fired a sponge round, he believed his only
21 "Zone 1" shot was at Plaintiff. (SUF ¶ 34.) And Defendant Arnett believed that
22 aiming anywhere other than Plaintiff's lower extremities could cause serious injury
23 or death to either Plaintiff or Inmate Murrillo. (SUF ¶ 34.) It was not until after the
24 fight was over and Plaintiff was being carried out of the building that Defendant
25 Arnett saw that Plaintiff was injured. (SUF ¶ 33.)

III. DEFENDANT LOPEZ EVALUATES PLAINTIFF AND REFERS HIM FOR FURTHER MEDICAL CARE.

Defendant Lopez responded to the incident around 10:10 a.m., and evaluated Plaintiff about five minutes later. (SUF ¶ 35.) Plaintiff claims that he refused to answer Defendant Lopez's questions as she prepared the CDCR Form 7219, but a correctional sergeant told Defendant Lopez to document that Plaintiff had slipped in water. (SUF ¶ 36.) Defendant Lopez crossed out the "No Comment" statement that she initially wrote and then wrote that Plaintiff "hurt my leg when I slipped in water." (SUF ¶ 37.) Defendant Lopez also indicated on the form that Plaintiff had pain in his lower left leg, but did not record any other injuries on the form. (SUF ¶ 38.)

After completing the CDCR Form 7219, at about 10:20 a.m., Defendant Lopez referred Plaintiff to the prison's emergency room, known as the Triage and Treatment Area (TTA). (SUF ¶ 39.) A CDCR Form 7219 is not transmitted to the TTA with an inmate-patient. (SUF ¶ 40.) Once Plaintiff arrived in the prison's emergency room, he was evaluated around 10:34 a.m. by a licensed vocational nurse and a doctor. (SUF ¶ 41.) Medical personnel in the TTA gave Plaintiff pain medication, stabilized his left leg, and arranged for him to be transported to an outside hospital, Palmdale Regional Medical Center. (SUF ¶ 42.)

At approximately 12:00 p.m., Plaintiff was transported to Palmdale Regional Medical Center, an outside hospital. (SUF ¶ 43.) There, Plaintiff was diagnosed with a fractured left tibia and fibula, which was surgically repaired the next day. (SUF ¶ 43.) Plaintiff's right thigh and buttocks wounds were also treated at Palmdale Regional Medical Center. (SUF ¶ 44.) Plaintiff was discharged on December 1, 2013. (SUF ¶ 45.)

Upon his return to prison, Plaintiff was provided housing accommodations (ground-floor cell and bottom-bunk), medical equipment (wheelchair, crutches, mobility vest), and job restrictions. (SUF ¶ 46.) Plaintiff also received pain

1 medication and physical therapy. (SUF ¶ 46.) Lopez was not involved in
2 Plaintiff's medical care while in the TTA or at Palmdale Regional Medical Center.
3 (SUF ¶ 47.)

4 STANDARD OF REVIEW

5 Federal Rule of Civil Procedure 56 provides that a summary-judgment motion
6 shall be granted when there is no genuine issue as to any material fact, and if the
7 moving party is entitled to judgment as a matter of law. In *Celotex Corporation v.*
8 *Catrett*, 477 U.S. 317, 322-23 (1986), the Supreme Court held that Rule 56(c)
9 mandates the entry of summary judgment against a party who fails to make a
10 showing sufficient to establish the existence of an element essential to the party's
11 case, and on which that party will bear the burden of proof at trial. The
12 non-moving party's failure of proof on an essential element of its claim renders all
13 other facts immaterial. *Id.*

14 To prevent entry of summary judgment, Plaintiff must present competent
15 evidence showing that there are genuine issues of material fact regarding whether
16 Defendants violated his rights. *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir.
17 1986). Plaintiff cannot rest solely on conclusory allegations (*id.*), but must present
18 "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at
19 323-24. A fact is material only if it affects the outcome of the case under applicable
20 substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
21 Summary judgment may be granted if the non-moving party's evidence is merely
22 colorable or is not significantly probative. *Id.* at 250-51. "The mere existence of a
23 scintilla of evidence in support of the non-moving party's position is not
24 sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.
25 1995). Additionally, if the non-moving party's version of facts is "blatantly
26 contradicted by the record, so that no reasonable jury could believe it, a court
27 should not adopt that version of the facts for purposes of ruling on a motion for
28 summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

ARGUMENT

I. DEFENDANT LOPEZ IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE HER ALLEGED INACTION DID NOT RESULT IN ANY DELAY IN TREATMENT OR HARM TO PLAINTIFF.

Because the undisputed facts demonstrate that Defendant Lopez's alleged conduct did not result in any delay in treatment or any harm to Plaintiff, she is entitled to judgment as a matter of law.

To meet the requirements of a deliberate-indifference claim, Plaintiff must show that Defendant Lopez committed a purposeful act or failed to respond to pain or possible harm, which then actually resulted in harm, not mere delay. *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992) (overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)). "[I]ndifference to the inmate's medical needs must be purposeful and substantial; negligence, inadvertence, or differences in medical judgment or opinion do not rise to the level of a constitutional violation." *Fleming v. LeFevere*, 423 F. Supp. 2d 1064, 1070 (C.D. Cal. 2006) (citing *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)). "Deliberate indifference involves an examination of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's response to that need." *McGuckin*, 974 F.2d at 1059 (citing *Hudson v. McMillian*, 503 U.S. 1, 1000 (1992)).

Plaintiff's deliberate-indifference claim appears to be premised on the allegations that Defendant Lopez: (1) should have identified on the Form 7219 that his left leg was broken instead of marking that he experienced left-leg pain, (2) failed to identify on the Form 7219 that Plaintiff was shot in the right thigh and buttocks, and (3) wrote that Plaintiff "slipped in water" to cover up the allegedly excessive use of force by Defendant Arnett. (ECF No. 94 at 6-10.) But even if Defendant Lopez did not properly document Plaintiff's injuries,² or the

² Defendant Lopez is not a physician and cannot make medical diagnoses, such as "broken bone." (Lopez Depo. at 64:24-69:4.)

1 circumstances causing the injury, the evidence demonstrates no violation of the
2 Eighth Amendment occurred because there was no delay in Plaintiff receiving care,
3 and he suffered no harm as a result of her alleged conduct.

4 Defendant Lopez evaluated Plaintiff at approximately 10:15 a.m., and within
5 approximately five minutes of her evaluation, she contacted the prison's emergency
6 room to have Plaintiff transported there for emergency medical care. (SUF ¶¶ 34-
7 38.) He arrived in the prison's ER at approximately 10:34 a.m. (SUF ¶ 40.) The
8 CDCR Form 7219, with the purported inaccuracies, was not transmitted with
9 Plaintiff. (See SUF ¶ 39.) And, significantly, Defendant Lopez was not involved in
10 Plaintiff's care after he was transferred to the prison's ER. (SUF ¶ 46.)

11 Medical staff in the prison's ER completed their own evaluation of Plaintiff,
12 including of both of his lower extremities. (SUF ¶ 41; *see also* Holman Decl. ¶ 6.)
13 After their own evaluation, medical personnel gave Plaintiff pain medication,
14 stabilized his left leg, and arranged for him to be transported to Palmdale Regional
15 Medical Center, where he arrived at around 12:00 p.m. (SUF ¶ 41.) Plaintiff was
16 also immediately evaluated there, and the following day his left leg was surgically
17 repaired. (SUF ¶ 42.) The wounds to Plaintiff's thigh and buttocks wounds were
18 also treated at Palmdale Regional Medical Center. (SUF ¶ 43.) And, after Plaintiff
19 returned to prison, he received housing and medical accommodations, pain
20 medication, physical therapy, and job restrictions. (SUF ¶ 45.)

21 There is no evidence that Defendant Lopez's alleged inaction, or failure to
22 accurately complete a custody form, delayed Plaintiff's treatment or caused him
23 any harm. Defendant Lopez is the one who arranged for Plaintiff to receive
24 emergency medical care in the first place. And she had no further involvement in
25 his treatment once he transferred to the prison's ER. Accordingly, Defendant
26 Lopez is entitled to judgment as a matter of law.

1 **II. DEFENDANT ARNETT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW**
2 **BECAUSE HE DID NOT USE FORCE MALICIOUSLY AND SADISTICALLY**
3 **BUT INSTEAD TO RESTORE ORDER.**

4 Defendant Arnett used the minimal force available to him, and only used force
5 while the physical fight between Inmate Murrillo and Plaintiff was on-going.
6 Because he did not use force maliciously and sadistically, but instead to restore
7 institutional security, Defendant Arnett is also entitled to judgment as a matter of
8 law.

8 **A. Legal Standard for Excessive-Force Claims.**

9 The use of excessive force by prison official violates the Eighth Amendment.
10 *Hudson v. McMillan*, 503 U.S. 1, 6-7 (1992). However, “not every push or shove,
11 even if it may later seem unnecessary in the peace of a judge’s chambers, violates a
12 prisoner’s constitutional rights.” *Meredith v. Arizona*, 523 F.2d 481, 483 (9th Cir.
13 1975). *De minimis* uses of physical force do not fall under the umbrella of Eighth
14 Amendment protection. *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (quoting
15 *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

16 The relevant inquiry for determining whether prison officials used excessive
17 physical force in violation of the Eighth Amendment is whether force was applied
18 in a good-faith effort to maintain or restore discipline, or, instead, was applied
19 maliciously and sadistically for the very purpose of causing harm. *Hudson*, 503
20 U.S. at 6-7 (citing *Whitley*, 475 U.S. at 312). Factors considered in this inquiry
21 include: the necessity of the force used, the relationship between the necessity and
22 the amount of force used, the threat reasonably perceived by the responsible
23 officials, any efforts made to temper the severity of a forceful response, and the
24 extent of the injury inflicted. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994);
25 *Whitley*, 475 U.S. at 321.

26 When, like here, the “ever-present potential for violent confrontation and
27 conflagration ripens into *actual* unrest and conflict, the admonition that a prison’s
28 internal security is peculiarly a matter normally left to the discretion of prison

administrators carries special weight.” *Whitley*, 475 U.S. at 321 (internal citations omitted) (emphasis in original). In these circumstances, prison officials should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Id.* at 321-22. While this deference “does not insulate from review actions taken in bad faith and for no legitimate purpose,” it does require that “neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.” *Id.* at 322. When analyzing whether evidence exists to support an excessive-force claim, the “court must determine whether the evidence goes beyond a mere dispute over the reasonableness of a particular use of force or the existence of arguably superior alternatives. Unless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain . . . the case should not go to the jury.” *Id.*

B. The Undisputed Evidence Demonstrates that Defendant Arnett Did Not Use Force Maliciously and Sadistically, But Instead to Restore Order.

The undisputed evidence demonstrates that Defendant Arnett used the less severe of the two force options available to him to stop a serious physical fight. And he only used force while the fight was on-going. He is, therefore, entitled to judgment as a matter of law.

Plaintiff’s excessive-force claim is essentially that Defendant Arnett should have shot at Inmate Murrillo because he was the aggressor in the fight. But even if Plaintiff’s account of the altercation was true, Defendant Arnett reasonably perceived that there was a mutual fight occurring. Plaintiff admits that when he felt the first shot make contact, Inmate Murrillo had just punched him in the head and Plaintiff had his hands up towards his head. (SUF ¶¶ 17-18.) From where Defendant Arnett was positioned—30 to 50 feet away—he reasonably perceived both inmates were fighting. (SUF ¶ 19.) Then, for the remainder of the fight,

1 Plaintiff claims he had his arms wrapped around Inmate Murrillo and his head
2 buried in Murrillo's stomach while Murrillo continued to punch him. (SUF ¶¶ 23,
3 24, 27.) Again, from Arnett's perspective, both inmates appeared to be fighting,
4 and there was a serious risk of harm to both inmates each time he fired a sponge
5 round. (SUF ¶¶ 26, 29.) And it is undisputed that when the inmates got on the
6 ground and stopped fighting, Defendant Arnett stopped using force. (SUF ¶ 30.)

7 Further, Defendant Arnett used the lesser of the two force options available to
8 him. (See SUF ¶ 13.) Instead of shooting live rounds, he elected to shoot sponge
9 rounds at the inmates. (SUF ¶¶ 13, 21, 26, 29.) And when shooting sponge rounds,
10 Defendant Arnett was trained to shoot only at "Zone 1," which is below the waist
11 excluding the groin area. (SUF ¶ 7.) Each time Defendant Arnett fired, he believed
12 his only "Zone 1" shot was at Plaintiff. (SUF ¶ 34.) Even by Plaintiff's own
13 account, for at least the second two shots, Defendant Arnett did not have any "Zone
14 1" shot of Inmate Murrillo, because Plaintiff was physically in front of Murrillo's
15 legs. (See SUF ¶¶ 23-24, 28.) Based on Plaintiff's and Inmate Murrillo's positions
16 during the fight, Defendant Arnett believed that aiming anywhere other than
17 Plaintiff's lower extremities could cause serious injury or death to either inmate.
18 (SUF ¶ 34.)

19 Defendant Arnett also sought to avoid the use of force in the first place by
20 verbally ordering the inmates to stop fighting. (SUF ¶¶ 19, 25.) Plaintiff's
21 allegation that he did not hear such instructions is insufficient to create a triable
22 issue of material fact. See *Brown v. Lopez*, No. 1:10-cv-00124 GSA PC, 2013 WL
23 6512833, *8-*9 (E.D. Cal. Dec. 12, 2013) (concluding inmate-plaintiff's subjective
24 impressions that he heard no alarm and did not see prison staff respond to his
25 assault were insufficient to defeat summary judgment).

26 The situation Defendant Arnett was confronted with was violent, and he was
27 forced to act immediately. There were no other officers in the building, and
28 Defendant Arnett could not leave his position in the control booth. (SUF ¶¶ 12-13.)

1 Faced with two force options, he chose the lesser of the two, and aimed and shot at
2 Plaintiff's lower extremities because that was the area he was trained to shoot at.
3 (See SUF ¶ 13, 21, 26, 29.) And he believed aiming anywhere else could cause
4 serious injury or death to either of the inmates. (SUF ¶ 34.) As soon as the inmates
5 got down and stopped fighting, Defendant Arnett stopped using force. (SUF ¶ 30.)
6 There is simply no evidence to suggest that Defendant Arnett's actions were
7 motivated by animus towards Plaintiff.

8 This case should not go to a jury, because the undisputed evidence does not
9 support an inference of "wantonness in the infliction of pain," even when viewed in
10 the light most favorable to Plaintiff. Therefore, Defendant Arnett is entitled to
11 judgment as a matter of law.

12 **III. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.**

13 **A. Legal Standard for Qualified Immunity.**

14 Qualified immunity shields state officials "from liability for civil damages
15 insofar as their conduct does not violate clearly established statutory or
16 constitutional rights of which a reasonable person would have known." *Harlow v.*
17 *Fitzgerald*, 457 U.S. 800, 818 (1982). The initial inquiry for qualified immunity is
18 whether a constitutional right would have been violated on the facts established.
19 *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no constitutional right was violated
20 under the alleged facts, the inquiry ends and defendants prevail. *Id.* at 204. If,
21 however, "a violation could be made out on a favorable view of the parties'
22 submissions, the next, sequential step is to ask whether the right was clearly
23 established." *Id.* at 201-02. Courts may consider these two questions in either
24 order, and a favorable determination for the defendant on either establishes
25 qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

26 "A clearly established right is one that is sufficiently clear that *every*
27 reasonable official would have understood that what he is doing violates that right."
28 *Mullinex v. Luna*, 577 U.S. ___, 136 S. Ct. 305, 308 (2015) (per curiam) (internal

1 quotations omitted) (emphasis added); *see also Hamby v. Hammond*, 821 F.3d
2 1085, 1090-91 (9th Cir. 2016). While a case directly on point is not required,
3 “existing precedent must have placed the statutory or constitutional question
4 beyond debate.” *Id.* (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).
5 Qualified immunity permits reasonable mistakes as to what the law requires.
6 *Saucier*, 533 U.S. at 205. Moreover, a plaintiff bears the burden of establishing that
7 defendants violated a clearly established right. *Davis v. Scherer*, 468, U.S. 183,
8 187 (1984); *Browning v. Vernon*, 44 F.3d 818, 822 (9th Cir. 1995).

9 **B. Defendant Lopez Is Entitled to Qualified Immunity Because It**
10 **Would Not Have Been Clear to Hear That Referring Plaintiff**
11 **for Emergency Medical Care Violated the Constitution.**

12 As a preliminary matter, Defendant Lopez is entitled to qualified immunity
13 under the first prong of the *Saucier* analysis because, as set out above, the
14 undisputed evidence demonstrates that she was not deliberately indifferent to
15 Plaintiff’s serious medical needs. She is also entitled to qualified immunity under
16 the second prong of the *Saucier* analysis because it would not have been clear to
17 Defendant Lopez, or any other reasonable official, that inaccurately completing a
18 form, while still referring an inmate-patient to the prison emergency room,
19 amounted to deliberate indifference. Defendant Lopez arranged for Plaintiff to be
20 transported to the prison’s emergency room within five minutes of evaluating him,
21 and there, his left leg was stabilized and he was given pain medication. And the
22 CDCR Form 7219 that Plaintiff complains of was not relied on in determining
23 Plaintiff’s course of medical care. Defendant Lopez was not involved in Plaintiff’s
24 medical care after he was transported to the prison’s ER. Defendants are not aware
25 of any case that holds such conduct constitutes deliberate indifference. Because
26 Defendant Lopez was not on notice that her conduct was clearly unlawful, she is
27 entitled to qualified immunity.
28

C. Defendant Arnett Is Entitled to Qualified Immunity Because It Was Not Clearly Established that His Alleged Conduct Violated the Law.

Defendant Arnett is similarly entitled to qualified immunity under the first prong of the *Saucier* analysis because the undisputed evidence does not give rise to an inference that he maliciously and sadistically used force on Plaintiff. But even if the Court were to find that Plaintiff's claims would state a constitutional violation if proven, Defendant Arnett is still entitled to qualified immunity under the second prong of the *Saucier* analysis. *See Marquez v. Gutierrez*, 322 F.3d 689, 693 (9th Cir. 2003) (holding that a claim for qualified immunity is not defeated simply because a triable issue of fact exists as to whether decision to shoot prisoner was malicious).

It is clearly established "that a prison guard is permitted to use deadly force 'in a good faith effort to maintain or restore discipline.'" *Jeffers v. Gomez*, 267 F.3d 895, 912 (9th Cir. 2001) (citing *Whitley*) (finding prison officials were entitled to qualified immunity where inmate-plaintiff was shot while being attacked by an inmate with a knife-like weapon, because the fact that the bullet struck the plaintiff rather than his attacked amounted to "negligence or recklessness, at most"). Given this standard, it would not have been clear to a reasonable officer that firing a less-lethal sponge round at Plaintiff's lower extremities, while Plaintiff had his arms wrapped around another inmate that was punching him, would violate the Constitution. Indeed, a reasonable official could perceive, as Defendant Arnett did, that the inmates were engaged in a fight and both were in imminent danger of suffering serious injury and that firing the less-lethal round was consistent with, or even required by, prison officials' Constitutional obligations to protect inmates from attacks by other inmates. *See Jeffers*, 267 F.3d at 917-18 (recognizing the difficult balance in prison officials' duty to protect employees, visitors, and the inmates themselves).

1 And in cases similar to the case at bar, court have concluded that officers are
2 entitled to qualified immunity. For example, in *Petty v. Bradbury*, the inmate-
3 plaintiff was involved in a fight with another inmate in the prison dining hall and
4 brought suit after being shot in the neck by a defendant-correctional officer, who
5 fired a 40mm sponge round at the inmate fight from his control booth position. No.
6 16-1978 SK (PR), 2017 WL 11049960, at *3-*4 (N. D. Cal. Jan. 31, 2017). There
7 the court concluded there was no Eighth Amendment violation, and the officer was
8 entitled to qualified immunity because a “reasonable correctional official could
9 have believed that firing a “less-lethal” round at two closely positioned inmates in
10 order to stop an attack that could have seriously injured or killed one of the inmates
11 was a good-faith effort to restore order.” *Id.* at *4. Defendant Arnett similarly shot
12 at two closely positioned inmates with “less lethal” sponge rounds, in an attempt to
13 restore order. Accordingly, it was not clearly established at the time of the incident
14 –November 28, 2013—that Defendant Arnett’s conduct violated the Eighth
15 Amendment. He is therefore entitled to qualified immunity.

16 CONCLUSION

17 Because the undisputed evidence demonstrates that Defendant Arnett did not
18 use force maliciously and sadistically, and Defendant Lopez was not deliberately
19 indifferent to a serious medical need, they are entitled to judgment as a matter of
20 law. They are also both entitled to qualified immunity.

21 Dated: September 20, 2019

Respectfully submitted,

22 XAVIER BECERRA
23 Attorney General of California
24 MARISA Y. KIRSCHENBAUER
Supervising Deputy Attorney General

25 /s/ Cassandra J. Shryock
26 CASSANDRA J. SHRYOCK
27 Deputy Attorney General
28 *Attorneys for Defendants*
G. Arnett and M. Lopez

LA2016502475/21051604.docx

CERTIFICATE OF SERVICE

Case Name: Simmons, Kevin v. G. Arnett, et al. Case No. 2:16-cv-02858 R (KESx)

I hereby certify that on September 20, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**
- **DEFENDANT'S PROPOSED STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW**
- **DECLARATION OF I. HOLMAN IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT with Exhibit A**
- **DECLARATION OF M. LOPEZ IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT with Exhibits B and C**
- **DECLARATION OF DEFENDANT G. ARNETT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
- **DECLARATION OF DEPUTY ATTORNEY GENERAL BRYAN KAO IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT with Exhibits D to J**
- **[PROPOSED] JUDGMENT**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 20, 2019, at San Francisco, California.

B. Chung
Declarant

/s/ B. Chung
Signature